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IN THE

Supreme Court of the United States

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., and WELLSVILLE, OHIO CONGREGATION OF JEHOVAH'S WITNESSES, INC.,

Petitioners,

v.

VILLAGE OF STRATTON, OHIO, and JOHN M. ABDALLA, Mayor of the Village of Stratton, Ohio, in his official capacity,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN SUPPORT OF PETITIONERS

HERBERT D. SOLL,
Attorney General
KAREN M. KLAVER
Commonwealth of
The Northern Mariana Islands
Capitol Hill
Saipan, MP 96950
(670) 664-2341

DAVID COLLINS
Counsel of Record
GORDON & REES, LLP
275 Battery Street
20th Floor
San Francisco, CA 94111
(415) 986-5900

Counsel for Amicus Curiae Commonwealth of the Northern Mariana Islands

170881

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INTEREST OF AMICUS CURIAE

Pursuant to United States Supreme Court Rule 37.4, the Commonwealth of the Northern Mariana Islands (Commonwealth), through its Attorney General, submits this *amicus curiae* brief supporting Petitioners Watchtower Bible And Tract Society Of New York, Inc., and Wellsville, Ohio Congregation Of Jehovah's Witnesses, Inc.

The Commonwealth has a unique political relationship with the United States under an international agreement codified as the COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, Pub. L. No. 94-241, 90 Stat. 263, 42 U.N. TCOR Annex, U.N. Doc. T/1759 (1975), 48 U.S.C. 1801 & note (West Supp. 2001) (Covenant). *See generally United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 751-752, 754 (9th Cir. 1993); S. REP. No. 433, 94TH CONG. 1ST SESS. 65 (1975). The Commonwealth is an archipelago of 21 islands, with 184 square miles of land surface, collectively extending about 400 miles northward of Guam in the West Pacific ocean. S. REP. No. 596, 94TH CONG. 2D SESS. 2 (1976), *reprinted in* 2 1976 U.S. CODE, CONG. & ADMIN. NEWS 448, 449. Like residents of the States and other United States-affiliated islands, the people of the Commonwealth " 'are a religious people whose institutions presuppose a Supreme Being.' " *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (citation omitted).

The Commonwealth came within United States sovereignty pursuant to the Covenant in the mid-1980's. Prior to the Covenant, the Commonwealth was part of the now-defunct Trust Territory of the Pacific Islands, which the

United States administered as a United Nations trustee. *See generally* TRUSTEESHIP AGREEMENT FOR THE FORMER JAPANESE MANDATED PACIFIC ISLANDS, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665; *Saipan Stevedore v. Director, Workers' Comp. Programs*, 133 F.3d 717, 720-721 (9th Cir. 1998); *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d at 751-752.

The Commonwealth, like all governments under the American flag, is bound by the First and Fourteenth Amendment principle that "the government may (and sometimes must) accommodate religious practices [.]" *Hobbie v. Unemployment Appeals Board Commission of Florida*, 480 U.S. 136, 144 (1987). The First Amendment, including its guarantee of religious freedom, applies without limitation in the Commonwealth. *See* Covenant Section 501(a). As declared a century ago when this court first expounded the constitutional dimensions of insular relationships with the United States, freedom of religion is a fundamental constitutional right which is "indispensable to a free government." *Downes v. Bidwell*, 182 U.S. 244, 282-283 (1901) (plurality); *id.* at 290-291, 294, 298 (White, J., concurring).

The protection of the free exercise of religion, and the promotion of governmental accommodation of religion consistent with the First Amendment, thus is of vital interest to the people of the Commonwealth. This interest is particularly important in light of the Commonwealth's centuries of colonial domination by others prior to its voluntary accession into the American political family. Hundreds of years of colonial rule by Spain, Germany and Japan included both the suppression of indigenous religions and official preferences for certain faiths. SECOND INTERIM

REPORT OF THE NORTHERN MARIANA ISLANDS COMMISSION ON FEDERAL LAWS TO THE CONGRESS OF THE UNITED STATES 8 (1985); Don A. Farrell, HISTORY OF THE NORTHERN MARIANA ISLANDS 115, 149-154, 312-313 (1991); Francis X. Hezel, FROM CONQUEST TO COLONIZATION: SPAIN IN THE MARIANA ISLANDS (1989).

Because of this history, the Commonwealth is especially sensitive to the constitutional obligation of government throughout the United States to safeguard and accommodate the free exercise of religion, consistent with First Amendment constraints against the official establishment of religion. With respect, the Commonwealth asserts that the rulings below undercut this fundamental constitutional principle.

SUMMARY OF ARGUMENT

A. Enforcement of the First Amendment right of anonymity in the context of religious speech is necessary to preserve that constitutional right, as well as to further the related constitutional purpose of accommodating the free exercise of religion. This court historically has enforced the governmental obligation under the First Amendment to accommodate the free exercise of religion. This case provides an appropriate opportunity for reiteration of that constitutional obligation.

B. The First Amendment right of anonymous speech applies to door-to-door religious speech for the same constitutional reasons that mandated recognition of that right as to political speech in *Talley v. California*, 362 U.S. 60 (1960), *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999). There is no

constitutional justification, either textual or historical, for providing less protection to religious speech than to political speech. The Stratton ordinance violates the First Amendment both by infringing upon the right of anonymous speech and by singling out for suppression the religious speech of Jehovah's Witnesses. Stratton's asserted justification for its ordinance, on the ground that it deters recurrence of consumer fraud by door-to-door solicitors, lacks the relevant and concrete evidentiary basis required by the First Amendment.

ARGUMENT

A. ENFORCEMENT OF THE FIRST AMENDMENT RIGHT OF ANONYMOUS SPEECH WILL FURTHER THE RELATED FIRST AMENDMENT REQUIREMENT OF GOVERNMENTAL ACCOMMODATION OF RELIGION

Enforcement of the First Amendment right to anonymous speech in the context of religious speech, as requested by Petitioners, is essential both to preserve that right and to promote the governmental accommodation of religion required by the Free Exercise Clause. As previously noted, the Free Exercise Clause provides that "the government may (and sometimes must) accommodate religious practices [.]" *Hobbie v. Unemployment Appeals Board Commission of Florida*, 480 U.S. at 144. So it is here.

Governmental accommodation of constitutional "free exercise values" is "in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.' " *Gillette v. United States*, 401 U.S. 437, 453 (1971). This court accordingly has held government to its

constitutional obligation to accommodate religion without transgressing constraints against the establishment of religion. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 707-708, 713-717 (1977) (First Amendment prohibited New Hampshire from compelling Jehovah's Witnesses to display license plate slogan offensive to their religious beliefs); *Wisconsin v. Yoder*, 406 U.S. 205, 214-236 (1972) (First Amendment prohibited Wisconsin from compelling high school attendance by Amish children in conflict with their religion); *Sicurella v. United States*, 348 U.S. 385, 388-391 (1955) (Universal Military Training and Service Act construed to allow conscientious objector claim by Jehovah's Witness who opposed participation in government-declared wars but supported participation in a future divinely-declared spiritual war); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 634-642 (1943) (First Amendment prohibited public schools from compelling flag salutes by Jehovah's Witness students in violation of their religious beliefs).

This case provides an appropriate opportunity for the encouragement of accommodation of religion consistent with the commands and constraints of the First Amendment. That is a message worth repeating for the benefit of governmental entities throughout the United States. When, as here, the record shows that a governmental regulation burdens the free exercise of religion, " 'only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.' " *Hobbie v. Unemployment Appeals Board Commission of Florida*, 480 U.S. at 142 (citation omitted). As demonstrated herein, Stratton has not presented evidence, or anything other than speculation, to establish overriding interests which justify the burden upon the free exercise of religion caused by the identification requirement in its

ordinance. Confirmation that this requirement violates the Free Exercise Clause will preserve and strengthen the right to anonymous speech guaranteed by the First Amendment, as well as reinvigorate the related doctrine mandating governmental accommodation of religion.

B. THE FIRST AMENDMENT RIGHT OF ANONYMITY IN POLITICAL SPEECH APPLIES EQUALLY TO RELIGIOUS SPEECH

In upholding most of the ordinance at issue here, the United States Court of Appeals for the Sixth Circuit undermined the First Amendment right of anonymous speech long recognized by this court. This court enforced that right in the context of political speech in *Talley v. California*, 362 U.S. 60, 64-65 (1960). It reaffirmed that right, again as to political speech, in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341-344, 357 (1995) and *Buckley v. American Constitutional Law Foundation, Inc*, 525 U.S. 182, 199-200 (1999). The Sixth Circuit misinterpreted *McIntyre* and never mentioned *Talley* or *Buckley*. While acknowledging that *McIntyre* "established a First Amendment right to distribute political pamphlets anonymously," the Sixth Circuit refused to apply the constitutional rationale of *McIntyre* to the religious speech of Jehovah's Witnesses. *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 240 F.3d 553, 563 (6th Cir. 2001). This ruling misconceived constitutional doctrine.

There is no basis in the language or history of the First Amendment for affording less protection to religious speech than to political speech. *Buckley* underscored that First Amendment protection is " 'at its zenith' " when speech

"involves 'interactive communication concerning political change.' " *Buckley*, 525 U.S. at 186-187. Interactive communication concerning religion, such as that involved in door-to-door ministry, warrants the same heightened constitutional protection. As established over fifty years ago in decisions upholding the religious speech rights of Jehovah's Witnesses, the freedoms of religion, press, speech and assembly guaranteed by the First Amendment equally deserve "the same preferred treatment." *Saia v. State of New York*, 334 U.S. 558, 561 (1948); *accord Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940). "[T]hese liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U.S. at 310. The courts below did not adequately consider these constitutional values.

1. The First Amendment Right Of Anonymous Speech

The rulings below contravened fundamental First Amendment principles, which guarantee the right to engage in anonymous speech. As held in *McIntyre* and *Talley*:

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hands of an intolerant society.

McIntyre, 514 U.S. at 357 (citation and footnote omitted).

> [T]he interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

Id. at 342 (footnote omitted).

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all ... Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

Talley, 362 U.S. at 64.

> [Q]uite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for the writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.

McIntyre, 514 U.S. at 342.

As reflected by *McIntyre* and *Talley*, the First Amendment right of anonymous speech is especially important in the context of pamphlet distribution such as that conducted through door-to-door ministry by Jehovah's Witnesses. "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty [.]" *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (ruling unconstitutional a conviction of a Jehovah's Witness under an ordinance that banned literature distribution within city without city manager's permission). As this court unanimously held when reversing an unconstitutional conviction of a Jehovah's Witness under an ordinance banning the house-to-house distribution of literature without a permit:

> [P]amphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people ... To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.

Schneider v. New Jersey, 308 U.S. 147, 164 (1939); *see id.* at 157-159, 163.

The holding above in *Schneider* reflects this court's vigilant protection of the First Amendment right to engage in the door-to-door communication of religious speech. The constitutional imperatives for this vigilance were elaborated in a decision which reversed the conviction of a

Jehovah's Witness for door-to-door distribution of religious literature in violation of an ordinance held unconstitutional in *Martin v. City of Struthers*, 319 U.S. 141 (1943).

Martin observed that "[m]any of our most widely established religious organizations have used this method of disseminating their doctrines." *Martin v. City of Struthers*, 319 U.S at 145 and n.6. As *Martin* further explained:

> For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings . . . [¶¶] The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance . . . [¶¶] Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

Id. at 141, 143, 146-147; *accord Marsh v. Alabama*, 326 U.S. 501, 505 (1946) (reversing unconstitutional conviction of a Jehovah's Witness for distributing religious literature without a permit on privately owned sidewalk).

2. Stratton's Ordinance Violates The First Amendment By Infringing Upon The Right Of Anonymous Speech And By Singling Out For Suppression The Religious Speech Of Jehovah's Witnesses

Stratton's ordinance does not withstand scrutiny under these First Amendment principles. The ordinance has essentially the same defect that rendered unconstitutional the laws struck down in *McIntyre*, *Talley* and *Buckley*.

Here, as in those three cases, the law in question purports to suppress speech protected by the First Amendment unless the speaker first divulges his or her identity. Sections 116.03 and 116.04 of Stratton's ordinance prohibit door-to-door canvassing on private property unless one first obtains, and displays upon request, a municipal permit identifying the canvasser by name and address. *See* REPLY BRIEF SUPPORTING PETITION FOR CERTIORARI, APPENDIX at 3-4. The unconstitutional ordinances in *McIntyre* and *Talley* similarly prohibited political campaign literature that did not bear the names and addresses of the people who wrote, printed and distributed it. *McIntyre*, 514 U.S. at 336, 338 and n.3; *Talley*, 362 U.S. at 60-61, 64. In *Buckley*, this court unanimously ruled unconstitutional a statute that required initiative petition circulators to wear identification badges bearing their names. *Buckley*, 525 U.S. at 186, 197-200; *id.* at 206 (Thomas, J., concurring in the judgment); *id.* at 217 (O'Connor, J., concurring in part in the judgment and dissenting in part); *id.* at 232 (Rehnquist, C.J., dissenting).

In a holding equally applicable to Stratton's ordinance, *Talley* explained why identification requirements violate the First Amendment:

> There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."

Talley, 362 U.S. at 64 (citation omitted). *See also Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 88, 91-98, 101-102 (1982) (First Amendment right of privacy of association prohibits compelled disclosure of names and addresses of political party's financial contributors and recipients).

Stratton's ordinance also violates the First Amendment, both facially and as applied, by singling out for suppression the religious speech of Jehovah's Witnesses. "[I]t was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.' " *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Governmental action denigrating a particular religion violates the First Amendment because it sends a message to adherents that they are outsiders, and an accompanying message to non-adherents that they are favored insiders within the community. *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985). As James Madison forcefully explained:

> It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance.

THE COMPLETE MADISON 300, 303 (S. Padover ed. 1953).

As enacted and supplemented, Stratton's ordinance facially discriminated against Jehovah's Witnesses. In conjunction with enactment of the ordinance, Stratton promulgated a "registration" form on which residents could denote organizations that they wished to exclude from their property. Jehovah's Witnesses were the only religious group included among the organizations listed on the form, next to which residents could place a checkmark to indicate a desire to exclude. The courts below correctly invalidated the form as unconstitutional. *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 240 F.3d at 558-559, *affirming id.*, 61 F. Supp.2d at 739. But that does not end the inquiry.

Even if Stratton's ordinance is now facially neutral as to religion in light of the rulings below, "[f]acial neutrality is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S at 534. "Apart from the text, the effect of a law in its real operation is strong evidence of its object." *Id.* at 535. The Free Exercise Clause "extends beyond facial discrimination," so as to forbid as well " 'subtle departures from neutrality' " and " 'covert suppression of particular religious beliefs.' " *Id.* at 534 (citations omitted).

This court therefore has strictly enforced the Free Exercise Clause when, as here, the suppression of religious speech by Jehovah's Witnesses resulted from the unconstitutional application of facially neutral ordinances. *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 272-273 (1951) (ordinances applied so as to allow religious speech in public parks by all religions except Jehovah's Witnesses). The record establishes that the Stratton ordinance was unconstitutionally applied with the intent to silence religious speech by Jehovah's Witnesses. Two years after enactment of the ordinance, Stratton's mayor confronted Jehovah's Witnesses who had renewed contact with residents who previously expressed interest in Bible-based discussions. The mayor told them that they were "not allowed" in Stratton, and that people had moved to Stratton with the "understanding" that Jehovah's Witnesses would not "bother" them. TR 76-77. The mayor's statements mirrored those made in the early 1990's by a Stratton police officer, who expelled Jehovah's Witnesses from the village while proclaiming that he "could care less" about their constitutional right to engage in door-to-door ministry. TR 58-59. "The Free Exercise Clause 'protects religious observers against unequal treatment' " such as that inflicted by Stratton against Jehovah's Witnesses in applying its ordinance. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 542 (citation omitted).

3. The Asserted Justification For The Village Of Stratton's Ordinance Has No Constitutional Or Evidentiary Basis

There is no merit to Stratton's attempt to justify the ordinance's identification requirement on the ground that it deters fraud. The courts below accepted this justification.

Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 240 F.3d at 565-567; *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 61 F. Supp.2d 734, 736-738 (S.D. Ohio 1999). However, "[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded." *Niemotko v. Maryland*, 340 U.S. at 271. Independent evidentiary review is necessary in part because "[t]he distinction between laws burdening and laws banning speech is but a matter of degree." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000). Upon independent review, this court should reject for three reasons Stratton's asserted justification for its ordinance's identification requirement.

First, it is settled by *Talley*, *McIntyre* and *Buckley* that identification requirements in the circumstances here violate the First Amendment. The Sixth Circuit, which misconstrued *McIntyre* and ignored *Talley* and *Buckley*, erroneously upheld the identification requirement based upon pre-*Talley* dicta suggesting that such requirements might be permissible. *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 240 F.3d at 562, citing *Martin v. City of Struthers*, 319 U.S. at 148 & n.14 and *Cantwell v. Connecticut*, 310 U.S. at 306.

Second, this court made clear, over sixty years ago, that generalized fears about fraud like those advanced here by Stratton are insufficient to overcome the First Amendment right of Jehovah's Witnesses to engage in door-to-door ministry.

> Conceding that fraudulent appeals may be made in the name of charity and religion, we hold that a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval . . . Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

Schneider v. New Jersey, 308 U.S. at 164. As this court has observed in other contexts:

> [T]he fact that a given law or procedure is efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives – or the hallmarks – of democratic government.

Bowsher v. Synar, 478 U.S. 714, 736 (1986) (constitutional separation of powers constraints invalidated legislation purporting to authorize congressional involvement in execution of laws).

Third, the record is devoid of evidence that Stratton's residents have suffered fraud or other overreaching at the

hands of door-to-door religious ministers. Not even the pre-*Talley* dicta mistakenly relied upon by the Sixth Circuit intimated that identification requirements are permissible without a relevant evidentiary basis. There is no such evidentiary basis here. Stratton asserts that it enacted its ordinance in response to complaints about occasionally fraudulent solicitors, most of whom had "commercial" purposes. BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI at 1. Based upon this assertion, Stratton invites judicial speculation that door-to-door religious ministry was part of the perceived problem. Nothing in the record supports such speculation. As cautioned by precedent in a variety of constitutional settings, "[s]peculations do not supply evidence [.]" *Burns v. Richardson*, 384 U.S. 73, 88 & n.14 (1966) (equal protection analysis of state legislative apportionment).

The First Amendment requires concrete evidence, not speculation, as a basis for regulation of the time, place and manner of protected speech. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. at 822 ("[T]he Government must present more than anecdote and supposition" to justify legislation requiring cable television operators to block or limit sexually explicit channels). As Justice Harlan emphasized in *Talley*, "generality is . . . too remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech that this all-embracing ordinance is likely to have." *Talley*, 362 U.S. at 67 (Harlan, J., concurring). "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *City of Boerne v. Flores*, 521 U.S. 507, 530-532 (1997)

(citation omitted) (Religious Freedom Restoration Act of 1993 invalidated in part due to of lack of evidence in legislative record of alleged harms).

The First Amendment therefore requires evidence that harms addressed by a regulation are real, substantial and direct.

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way.

Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 664 (1994) (plurality) (citation omitted) (remanding for determination of availability of less restrictive means of cable television regulation).

The ordinance at issue here does not comport with these constitutional standards. As indicated, Stratton proffers only improper speculation as a basis for salvaging the ordinance. In doing so, Stratton also runs afoul of prior decisions for Jehovah's Witnesses which confirmed that religious speech enjoys greater First Amendment protection than commercial speech.

> The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use

> the press for expressing one's views is not to be measured by the protection afforded commercial handbills . . . Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way.

Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 111 (1943); *accord Follett v. Town of McCormick*, 321 U.S. 573, 576-577 (1944) (ruling unconstitutional ordinances that prohibited house-to-house canvassing without a license and tax payment). *See also McIntyre*, 514 U.S. at 353-354 and nn.17-18 (questioning whether First Amendment protection of corporate speech is coextensive with constitutional protection afforded to individuals).

Justice Murphy framed the core constitutional value at stake, when concurring in the *Martin* decision upholding the First Amendment right of Jehovah's Witnesses to communicate religious speech from house to house. He reminded governmental entities and the public that "[f]reedom of religion has a higher dignity under the Constitution than municipal or personal convenience." *Martin v. City of Struthers*, 319 U.S. at 151 (Murphy, J., concurring).

This is true of all freedoms guaranteed by the Bill of Rights, which "are designed to limit the flexibility and freedom of governmental authorities." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 322 (1987) (involving Fifth Amendment right to just compensation for temporary regulatory takings of property).

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government" . . . and we must in all cases "weigh the circumstances and appraise the reasons in support of regulation of those rights."

Marsh v. Alabama, 326 U.S. at 509.

For the reasons above, this Court should hold unconstitutional under the First Amendment the identification requirement in Stratton's ordinance. As warned during congressional debate over the First Amendment, "[t]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." I ANNALS OF CONGRESS 757 (1789) (remarks by Representative Carroll), *cited in Lee v. Weisman*, 505 U.S. 577, 605-606 (1992) (Blackmun, J., concurring). This case exemplifies the grave danger to constitutional rights which results when the governmental hand sweeps too broadly. With that danger in mind, the Commonwealth respectfully requests definitive confirmation that the First Amendment right to anonymous speech applies coextensively to religious speech and political speech.

CONCLUSION

The rulings below fundamentally conflicted with First Amendment jurisprudence. The judgment should be reversed in the interests of protecting as to religious speech the right of anonymous speech guaranteed by the First Amendment, and of promoting the related First Amendment requirement of governmental accommodation of religion.

Respectfully submitted,

HERBERT D. SOLL,
Attorney General
KAREN M. KLAVER
Commonwealth of
The Northern Mariana Islands
Capitol Hill
Saipan, MP 96950
(670) 664-2341

DAVID COLLINS
Counsel of Record
GORDON & REES, LLP
275 Battery Street
20th Floor
San Francisco, CA 94111
(415) 986-5900

Counsel for Amicus Curiae Commonwealth of the Northern Mariana Islands